

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)

RECEIVEDReclassification of License of)
Station KJEL(FM))
(Lebanon, Missouri))

RM-10567

AUG 29 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re: Application of)

Ozark Broadcasting, Inc.)
For Minor Change Application to)
KJEL (FM), Lebanon, Missouri)

File No. BPH-20030401ABZ

PETITION FOR RECONSIDERATION

Four Him Enterprises, L.L.C. ("Four Him"), licensee of KHCR(FM) (now KHZR), Potosi, Missouri, files this Petition for Reconsideration of the Commission's decision to dismiss Four Him's Petition for Rulemaking seeking substitution of channel 249C2 for its current channel 249C3. The Commission's decision should be reversed, and the Rulemaking reinstated.

Four Him's petition for rulemaking proposed amending the FM Table of Allotments by substituting Channel 249C2 for Channel 249C3 in Potosi, Missouri. In order to accommodate this channel substitution, Four Him requested, *inter alia*, that KJEL (Lebanon, Missouri) be reclassified as a C0 facility. In response, the Commission issued an *Order to Show Cause*, released on September 20, 2002, directing Ozark, by no later than October 21, 2002, to file a written statement showing with particularity why its license should not be modified as proposed by Four Him's petition for rulemaking. The *Order* further noted,

If no written statement is filed by the date referred to above [October 21, 2002] the Licensee will be deemed to have consented to a modification as proposed in this Order to Show Cause and a final Order will be issued if the modification is found to be in the public interest.

Ozark filed a late Opposition to the *Order to Show Cause* on November 5, 2002, claiming that it had not received "either constructive or actual notice of the Order." In its August 1, 2003

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letter to Four Him's counsel, the Commission agreed with Ozark, stating, "A review of official Commission records reveals no evidence that the Commission's staff actually mailed a copy of the *Order to Show Cause* to Ozark Broadcasting or its counsel . . . the licensee did not receive notice of our *Order to Show Cause* . . ." Therefore, the Commission accepted Ozark's application for minor modification and dismissed Four Him's petition for rulemaking.

The Commission bases its decision on the text of 47 U.S.C. §316(a)(1), which provides, "No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor . . ." Section 316(a)(1) requires the licensee or permittee to be "notified in writing," but neither specifies the form of such notice nor requires the Commission to mail or otherwise personally deliver notice to the licensee.¹ If Congress had intended actual notice, it would have drafted §316(a)(1) to require actual notice, in the same way that 47 U.S.C. §312(a)(1) requires the Commission to *serve* a copy of an Order for Show Cause to a licensee or permittee before revoking a license or permit.²

The Commission's established policy is that public notices provide *constructive* notice to interested parties. The Commission has held that such parties have a responsibility to review public notices, and that lack of actual notice does not excuse their failure to meet application deadlines. See Forus FM Broadcasting of New York, Inc., Memorandum Opinion and Order, 7 FCC Rcd 7880 at ¶5 (Dec. 2, 1992) ("From this [public] notice, interested parties are charged with constructive notice of the subject application. . . . WKFM, by the exercise of reasonable diligence, could have

¹ Nor does Section 73.5373, note 4 of the Commission's rules require actual notice. It states, "If the staff concludes that a triggering application is acceptable for filing, it will issue an order to show cause why the affected station should not be reclassified as a Class C0 station."

² Section 312(c) reads, in part,

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall *serve* upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued

(emphasis added) *See also* 47 C.F.R. §1.4000 (requiring that petitions for declaratory rulings and waivers in telecom proceedings be *served* on interested parties)

determined the facts relating to the proposed station's power and the effect it would have on the operation of WKFM."); In re Request of 220 Television, Inc., Dayton, Ohio; For Waiver of Section 73.3572 of the Commission's Rules, FCC 80-554 (Oct. 14, 1980) (interested party had constructive notice of cut-off filing date and, through "the exercise of reasonable diligence" in checking the Federal Register, could have ascertained the cut-off date); In Re Application of Selma Television, Inc. (WSLA-TV), Selma, Ala. for a Construction Permit, 29 FCC 2d 522 (May 12, 1971) (constructive notice is established by date of public notice, and lack of actual notice does not constitute good reason for waiver of filing deadline); In the Matter of Petition for Reconsideration filed by Black Hills Broadcasting, L.L.C., 14 FCC Rcd 16146 (Sept. 28, 1999) (denying request for waiver of filing deadline, on the basis that interested parties have a responsibility to review the Federal Register and keep abreast of all developments and information regarding proceedings in which they have an interest); National Black Media Coalition v. FCC, 760 F2d 1297, 1300 (D.C. Cir. 1985) ("private parties . . . must be able to rely upon, and make substantial expenditures, on the basis of, the finality of Commission action determined through the application of some objective and publicly knowable criteria—which 'public notice,' as defined in the Commission's rules, assuredly is.").

Ozark did receive written, constructive notice of the *Order to Show Cause*, since the *Order* was published in the Commission's public notices and released on September 20, 2002. Under the Commission's rules³ and the terms of the *Order to Show Cause* provided in the Public Notice, Ozark's filing period ended on October 21, 2002. Ozark had adequate opportunity to review the public notice and respond to the *Order to Show Cause*,⁴ but failed to do so by the October 21, 2002

³ Note 4 to Rule 73.3573 specifically states, in part, "The order to show cause will provide the licensee 30 days to express in writing an intention to seek authority to modify the subject station's technical facilities to minimum Class C HAAT or to otherwise challenge the triggering application. If no such intention is expressed and the triggering application is not challenged, the subject station will be reclassified as a Class C0 station, and processing of the triggering application will be completed."

⁴ Ozark was also on notice of Four Him's pending Petition for Rulemaking, including the proposal to reclassify KJEL in Lebanon, Missouri as a C0 facility, at the time the Commission released the *Order to Show Cause* on Public Notice. See Certificate of Service to Four Him's Petition for Rulemaking, dated April 23, 2001

deadline set by the Commission. Therefore, its pleadings submitted subsequent to that deadline should be dismissed.

As a prerequisite to the Commission granting a motion to accept a late-filed submission, the proponent must demonstrate that no party will be prejudiced by the acceptance of the submission. *See Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1555 (affirming the dismissal of a late-filed application on the grounds that the acceptance of such filing would have prejudiced other parties and interfered with the orderly conduct of the proceeding); *SBM Communications, Inc.*, FCC 91-288 (Sept. 25, 1991) (request to waive deadline and file one day late denied because of prejudice to other applicants in proceeding); *Quinto Broadcasting Corp.*, FCC 91-294 (Sept. 27, 1991) (denying late-filed amendment on grounds that acceptance of amendment would have been unfairly prejudicial to those parties that complied with the Commission's FM processing rules). Ozark has failed to demonstrate such lack of prejudice

Two parties in this proceeding—Four Him and KANZA, Inc. (see Informal Objection of KANZA, Inc., dated June 3, 2003) are prejudiced by the Commission's acceptance of Ozark's late filed Opposition and construction permit application. Both Four Him and KANZA will be prevented from upgrading and providing enhanced broadcast services to their communities. For instance, Four Him's allocation proposal would provide service to over 135,000 new persons, whereas Ozark's proposal would provide service to approximately 32,000 new persons (see footnote 3 of Informal Objection of KANZA, Inc.). Thus, the Commission's acceptance of Ozark's Opposition and construction permit application, and denial of Four Him's petition for rulemaking, is not in the public interest and should be reversed.

In summary, Four Him requests that the Commission reconsider its August 1, 2003 letter, reinstate Four Him's petition for rulemaking, deny Ozark's late-filed minor change application, and deny Ozark's Opposition and Motion to Accept Late-Filed Opposition. Acceptance of the late filed Opposition and minor change application violates Commission rules and procedures, prejudices the other parties involved in this rulemaking, and disserves the public interest.

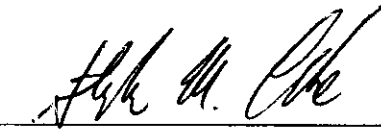
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Respectfully submitted,

FOUR HIM ENTERPRISES, L.L.C.

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By

A handwritten signature in black ink, appearing to read "A. Wray Fitch III", written over a horizontal line.

A. Wray Fitch III
Stephen M. Clarke

August 29, 2003

[K \1097\Potosi MO\3opp wpd]

CERTIFICATE OF SERVICE

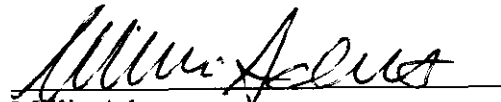
I, Millie Adams, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 29th day of August, 2003, by first-class, postage prepaid, U.S. Mail, copies of the foregoing PETITION FOR RECONSIDERATION to the following:

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